

USSB channels at three orbital positions, including five channels at 101°. On April 30, 1991, we assigned the remaining 27 channels at that orbital position to DIRECTV. In July 1991 – less than three months later – USSB and DIRECTV proposed joint use of a satellite then being constructed for DIRECTV to implement their respective DBS systems. The Commission approved that proposal, including the requested extension and modification of USSB's permit.

48. Petitioners argue that the staff ignored parallels between ACC's requests and the Commission's approval of the USSB/DIRECTV transaction. They say that USSB, like ACC, requested a second extension of time and modification of its construction permit to facilitate a cooperative venture. They say that USSB, like ACC, relied on a satellite planned for use in another permittee's DBS system to initiate its own DBS system. We disagree.

49. First, USSB had made a significant investment in its own DBS system, while ACC had not. Prior to grant of USSB's requests in 1992, USSB had accomplished the following: (1) spent more than \$23 million for a portion of a satellite, which constituted approximately forty percent of the price of its five-channel payload on the satellite; (2) arranged to finance the remaining completion and launch costs of the satellite; and (3) executed contracts with various suppliers of DBS home receiving systems.

50. By contrast, ACC's efforts to establish its own DBS system since the grant of its first extension of time have been minimal at best. Payments on ACC's satellite construction contract with Martin Marietta at the time of its application amounted to less than one percent of the contract price. Although the Bureau's ruling relied upon ACC's apparent failure to make substantial payment toward construction and operation of a satellite system – and contrasted it with USSB's \$23 million investment – ACC has failed to specify how much

money it actually spent on the other contract for its own further investment in the Tempo DBS construction permit.

51. Second, the cooperative venture was constructed and owned by DIRECTV, with "at its discretion" as to the USSB's construction contracts with program (5/32) of the costs of the venture. Moreover, USSB has not made separate arrangements for its own part of the venture, which would also abandon Marietta. USSB's permit to Tempo DI

52. Finally, the Commission indicates that it did not have expired. Prior

²⁴ United States Satellite Broadcasting Co., 5 FCC Rod 7576, 7577 (1990). USSB also was assigned three channels at 110° and eight channels at 148°. *Id.*

²⁵ See Advanced, 6 FCC Rod at 2270.

²⁶ USSB II, 7 FCC Rod at 7251.

²⁷ See ACC App. for Review at 15-16; Tempo DBS App. for Review at 15-16.

²⁸ USSB II, 7 FCC Rod at 7250.

²⁹ ACC Semi-Annual Report (dated May 10, 1993). ACC's semi-annual report dated April 27, 1994, notes that eleven payments have been made; neither this nor any other filing subsequent to May 1993, however, states specific amounts or percentages of the contract price paid. Moreover, under both the CPA and the assignment agreement, TCI is obligated to reimburse any payment made by ACC on its construction contract after September 8, 1994. See CPA at § 13.16; Agreement and Plan of Reorganization at § 13.16.

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³¹ USSB II, 7 FCC

³² See USSB Comp

³³ *Id.* at 7251.

³⁴ After construction the construction permit, and TCI 13.16; Agreement

money it actually invested in the construction of its satellites.¹⁰⁰¹ Nor has ACC proffered any other contract for launch- or operations-related services under which ACC must make any further investment in its system. ACC's efforts (up to and including its agreements with TCI and Tempo DBS) consisted principally of negotiations for a merger or transfer of its construction permit — rather than development of its own DBS system.

51. Second, with regard to reliance on another permittee, USSB entered a cooperative venture while ACC proposes to dissolve — the two are not the same. USSB constructed and owns part of a satellite and operates its own system independently of DIRECTV, with "full operational control" over the transponders it purchased and "sole discretion" as to the content of the programming to be transmitted over its channels.¹⁰⁰² USSB has constructed its own national broadcast center, initiated and entered into its own contracts with programmers, and bears financial responsibility for its proportionate share (5/32) of the costs incurred in the development of a transmit/receive encryption system.¹⁰⁰³ Moreover, USSB had paid \$1.3 million for development of the satellites to be used for USSB's channels at the two other orbital locations that it does not share with DIRECTV, and had made separate arrangements for launch of those satellites.¹⁰⁰⁴ By contrast, ACC would own no part of the satellites to be launched; its control over the channels is irrevocably contracted away under the CPA and sold outright under the assignment agreement. ACC would also abandon its rights under its own satellite construction contract with Martin Marietta.¹⁰⁰⁵ USSB's partial satellite ownership and independent operation are not comparable to ACC's arrangements either to "sell" transponder capacity to TCI or to assign its entire permit to Tempo DBS.

52. Finally, the timing of ACC's extension, assignment, and modification requests indicates that it did not intend to implement its DBS system alone or in cooperation with other permittees. ACC requested assignment of its permit just eleven weeks before it would have expired. Prior to that request, ACC had repeatedly revised its construction schedule to

¹⁰⁰¹ To the extent ACC has submitted its construction contract with its semi-annual reports, it has redacted the figures for progress payments. Despite a request for these figures during an *ex parte* meeting with ACC, the company has not provided the requested information.

¹⁰⁰² USSB II, 7 FCC Red at 7249.

¹⁰⁰³ See USSB Comments at 4.

¹⁰⁰⁴ *Id.* at 7251.

¹⁰⁰⁵ After consummation of either the CPA and the transfer agreement, ACC would be obligated to maintain the construction contract in effect "for the benefit of TCI" if necessary to maintain the construction permit, and TCI would reimburse ACC for any payments made on that contract. See CPA at §§ 7.2, 13.16; Agreement and Plan of Reorganization at §§ 7.3, 13.16.

delay milestones and payments.¹⁰⁵¹ USSB, on the other hand, made its arrangements to share a satellite with DIRECTV at least a year in advance of the scheduled expiration of its construction permit, and less than three months after DIRECTV received its channel assignments at the common orbital location. Moreover, USSB made payments to DIRECTV totalling forty percent of the contract price before the Commission approved an extension of time, and continued to pay for development of two additional satellites, investing in the ultimate success of its own DBS system rather than speculating on the possibility of being rescued at the eleventh hour by a suitor.

53. USSB's investment in an independent DBS operation using a portion of DIRECTV's satellite is not analogous to ACC's proposal either to sell transponder capacity on a satellite that it never contracted to build, or to transfer its permit outright and have no further involvement in the DBS service. As Tempo DBS said, "ACC does not propose to make any contribution to the Tempo program."¹⁰⁵² We consider the lack of ongoing involvement a key distinction between these two cases.

b. Directsat

54. Directsat received its DES construction permit in August 1989.¹⁰⁵³ We determined that Directsat had satisfied the first due diligence requirement in November 1993, and accordingly assigned it 10 channels at 119°.¹⁰⁵⁴ Five months later, Directsat sought to transfer control of its permit to the parent company of EchoStar, which held 11 channels at the same orbital position.¹⁰⁵⁵ We granted authorization for that transfer, specifically approving the for-profit nature of the transaction.

55. ACC and the other petitioners have argued that our resolution of the Directsat case mandates approval of ACC's extension application.¹⁰⁵⁶ We disagree.

56. First, unlike ACC, Directsat did not request an extension of its DBS construction permit. Second, as we noted in granting the transfer application, Directsat's investment in the development of its DBS system had been "substantial," and its progress toward actual

implementation had been "substantial."¹⁰⁵⁷ In its construction contract, ACC

57. ACC argues with "due diligence."¹⁰⁵⁸ what constitutes due diligence in construction permit, at the end of a permit's term Directsat accomplished in

58. We recognize proceeding with the construction assignments. Such information only on several months' particular satellite configuration assignments, there is a paucity of satellites. Moreover, negotiate with other permittees we draw a distinction between orbital/channel assignments

59. In this case, due diligence showing, in Directsat submitted its due diligence orbital assignments in two years prior to the expiration of its orbital/channel assignments with any DBS permittee with EchoStar continued in which time ACC repeated

¹⁰⁵¹ See ¶ 35, *supra*.

¹⁰⁵² See Tempo DBS App. for Review at 10.

¹⁰⁵³ Confidential, 4 FCC Red at 6300.

¹⁰⁵⁴ Directsat Corp., 8 FCC Red 7962 (vii. Svc. Div. 1993). Directsat was also assigned one channel at 110° W.L. and 11 channels at 175° W.L. *Id.*

¹⁰⁵⁵ Directsat, 10 FCC Red at 88.

¹⁰⁵⁶ ACC App. for Review at 21; Tempo DBS App. for Review at 17-19.

¹⁰⁵⁷ Directsat, 10 FCC Red

¹⁰⁵⁸ See ¶ 35, *supra*.

ACC App. for Review

¹⁰⁵⁹ As we previously advised in our comparison between the merits of its showing."

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implementation had been "steady and consistent with the schedule established in its construction contract."¹¹¹ By contrast, ACC has consistently delayed the schedule established in its construction contract.¹¹²

57. ACC argues that it has done as much as Directsat did, thus it too has proceeded with "due diligence."¹¹³ This contention is not supported by the facts. First, the measure of what constitutes due diligence is different depending on where the permittee is in the term of its construction permit. Put another way, we expect an applicant to have accomplished more at the end of a permit's life than in the middle.¹¹⁴ Second, even without this distinction, Directsat accomplished more than ACC has to date.

58. We recognize that a DBS permittee could encounter significant difficulty in proceeding with the construction of its system prior to receiving its specific orbital/channel assignments. Such information enables satellite contractors to order parts that are available only on several months' notice, complete satellite designs, and begin construction based on a particular satellite configuration.¹¹⁵ Until a permittee receives its orbital/channel assignments, there is a practical limitation on the progress it can make toward construction of its satellites. Moreover, a permittee without specific assignments is in no position to negotiate with other permittees for joint or coordinated development of their systems. Thus, we draw a distinction between the progress we expect from permittees who have received orbital/channel assignments and those who are awaiting such assignments.

59. In this case, ACC received channel and orbital assignments, based on its 1990 due diligence showing, in April 1991, over three years prior to the expiration of its permit. Directsat submitted its due diligence showing five months after ACC, but received its channel and orbital assignments in November 1993 -- two and a half years after ACC and less than two years prior to the expiration of its construction permit. Despite ACC's early receipt of orbital/channel assignments, it failed to commence satellite construction or come to terms with any DBS permittee on joint development of a DBS system. ACC's merger negotiations with EchoStar continued for almost three years, from early 1992 through late 1994, during which time ACC repeatedly deferred its satellite construction milestones. Directsat, by

¹¹¹ Directsat, 10 FCC Red at 89 (emphasis added).

¹¹² See ¶ 35, *supra*.

¹¹³ ACC App. for Review at 21.

¹¹⁴ As we previously advised ACC, "the grant of Advanced's extension request is not dependent upon a comparison between its showing and that of (another DBS permittee), but is instead dependent upon the merits of its showing." Advanced, 6 FCC Red at 2274.

¹¹⁵ See Dominion Video Satellite, Inc., DA 95-1734 (August 4, 1995).

contrast, successfully negotiated a merger with the same permittee, EchoStar, within five months of the award of its channel assignments.

60. When the Commission found that Directsat had satisfied the first prong of the due diligence obligation, it had a contract for delivery and launch of its first satellite in November 1997 and its second satellite in May 1998.¹¹¹⁶ When the Commission granted the transfer of control to EchoStar, Directsat was still proceeding toward construction under the same contract with virtually the same timetable.¹¹¹⁷ At the time the Commission found that ACC had met the first due diligence requirement as clarified in our Continental order, ACC's contract provided for delivery of its first satellite in January 1994.¹¹¹⁸ By May 1993, the delivery date had slipped to June 1996. By April 1994, construction was not even to start until April 1995, with delivery scheduled for the spring of 1998. All other payments and activities had been deferred accordingly.¹¹¹⁹ Unlike Directsat, ACC was not proceeding on the contract that we had previously considered and used as a basis for assessing due diligence. ACC essentially abandoned construction of its DBS system during its negotiations with EchoStar. ACC could have struck a deal earlier. Alternatively or in tandem, it could have proceeded to build its system. It made a business decision to do neither until its permit was about to expire.

61. The for-profit sale of a construction permit for an unbuilt radio or television broadcast station is prohibited by the Commission's rules.¹¹²⁰ In Directsat, we said that the reasons underlying this restriction -- maintaining the integrity of the application process and promoting the expeditious inauguration of new service -- serve important Commission objectives. But we held that a similar restraint need not be applied to DBS precisely because we had adopted due diligence and semi-annual reporting requirements to accomplish these same ends.¹¹²¹

62. Directsat stands for the proposition that there is no *per se* rule against selling a DBS construction permit for profit. It does not suggest that a construction permit should be extended for a party that has not been proceeding with due diligence, simply because that would allow the party to sell the permit for profit. In fact, the contrary is true. Directsat

¹¹¹⁶ Directsat Corp., 8 FCC Red at 7964 n.4.

¹¹¹⁷ See Directsat Semi-Annual Report (dated August 16, 1994) (schedule calls for delivery of first satellite on January 2, 1998, and second satellite on July 2, 1998).

¹¹¹⁸ Advanced, 6 FCC Red at 2272.

¹¹¹⁹ ACC Semi-Annual Reports (dated May 10, 1993 and April 27, 1994).

¹¹²⁰ See 47 C.F.R. § 73.3597(c)(2).

¹¹²¹ Directsat, 10 FCC Red at 89.

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B. Method for Future As

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¹¹²³ Petitioners assert that
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¹¹²⁴ Continental, 4 FCC

allows for-profit sales of permits based on the assumption that our due diligence rules will suffice to prevent warehousing.¹²² For this assumption to make any sense, we must enforce our due diligence rules, not extend the permit of those who have not met their obligations.

63. Directsat negotiated and consummated a transaction with EchoStar in five months that had eluded ACC for almost three years. While negotiating, Directsat continued to progress toward construction and operation of its DBS system, whereas ACC did not. Even ignoring the fact that Directsat did not request an extension of its permit, the circumstances of its case differ so markedly from the circumstances of this case that it serves only to demonstrate that a different outcome is appropriate here.¹²³ Our Directsat decision therefore lends no support to ACC's position.

B. Method for Future Assignments of DBS Resources

64. The DBS due diligence rules were designed to ensure that permittees would go forward expeditiously with the development of their systems. In this case, ACC's lack of due diligence has resulted in a warehousing of spectrum from which it now seeks to profit. Such a result would be contrary to the public interest in the prompt and efficient use of DBS spectrum to provide a competitive service to the public. Since ACC has failed to fulfill its due diligence obligations, its DBS construction permit will be cancelled and the associated orbital channel assignments will revert to the public for reassignment.

65. In our Continental order, we stated that,

in the event the permit of any of these applicants, or of any of the current permittees, is surrendered or cancelled, the remaining permittees from this group will have the first right to additional allocations, apportioned equally, up to the number requested in their applications.¹²⁴

At that time, we determined that such an assignment scheme would result in the most prompt disposition of the then-pending applications, and therefore would be preferable to any

¹²² The Commission's policy against warehousing is "designed to prevent an entity from acquiring, or retaining, orbital spectrum on the basis of speculative demand at the expense of other potential users." *GTE Corp. and Southern Pacific Co.*, 94 F.C.C.2d 235, 161 (1983).

¹²³ Petitioners assert that if we apply the same due diligence standard to Directsat as was applied to ACC, we will be forced to deny the extension requested by Directsat, whose permit expired on August 15, 1995. See ACC App. for Review at 18 n.38; Tempo DBS App. for Review at 20. We will apply the same criteria to Directsat as we have applied to ACC in determining whether an extension is justified.

¹²⁴ *Continental*, 4 FCC Rcd at 6299.

available comparative procedure. In almost six years since that decision, we have not had occasion to reassign any surrendered or cancelled channels.

66. EchoStar, Directsat, DBSC, and Continental ask that we reassign ACC's channels to the remaining DBS permittees, in accordance with the assignment policy announced in *Continental*.¹²²⁴ However, based on the record in this proceeding, the development of DBS service and technology since 1989, and our new auction authority granted by Congress, we believe this assignment method appears no longer to serve the public interest. For the reasons discussed below, we are currently of the view that the *Continental* assignment scheme should be abandoned, and that recaptured channels (and associated orbital locations) should be subject to a new window for applications for DBS authorizations. This window would be open to new entrants and current permittees alike, and mutually exclusive applications would be decided by auction. Accordingly, we intend to issue a Notice of Proposed Rule Making that reflects this approach by the end of this month, and to reach a final determination before the end of the year.

67. In this order, we have discussed three important policy goals for DBS service: (1) efficient use of a valuable public resource (DBS channels); (2) promotion of DBS as a competitor to cable; and (3) prompt delivery of DBS service to the public. It appears that the current DBS assignment policy involves inherent administrative delay and uncertainty, and hence does not facilitate the rapid use of DBS spectrum resources for delivery of service to the public. The failure of existing procedures to produce numerous DBS operators has also impeded progress toward our goal of having DBS compete directly with cable.¹²²⁵ Moreover, the current assignment scheme appears to hamper implementation of viable DBS systems and may not reflect the evolution of the DBS industry since its adoption, and therefore may no longer be consistent with these goals. Nor is it consistent with the public interest in "recover[ing] for the public of a portion of the value of the public spectrum resource made available for commercial use."¹²²⁶

68. In 1989, when the number of orbital locations and channels sought exceeded the number available in the last DBS processing round, lotteries and comparative hearings were

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70. It appears the
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ACC) received a total of

¹²²⁴ Letter from EchoStar to William F. Caton, dated May 12, 1995; Letter from Directsat to William F. Caton, dated May 13, 1995; Letter from Continental to William F. Caton, dated June 19, 1995; and Letter from DBSC to William F. Caton, dated July 7, 1995.

¹²²⁵ This goal is shared by Congress, which indicated in the Cable Act of 1992 its strong support for services (like DBS) that compete with cable. See 47 U.S.C. § 748.

¹²²⁶ See 47 U.S.C. § 309(j)(3)(C). We note that MCI has stated that it would submit an opening bid of \$175 million for the 27 reclaimed channels at the 110° orbital location. See Letter from Gerald H. Taylor, President and Chief Operating Officer of MCI, to Hon. Reed E. Hundt (dated Oct. 10, 1995).

¹²²⁷ *Continental*, 4 FCC R.

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¹²²⁹ See, e.g., *Assignment*
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FCC No. 95-229, June
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the only options for assigning these resources.¹²⁸ Each of the then-available options for resolving mutually-exclusive applications involved complex processing procedures and significant regulatory delay. We resolved the issue by granting each application only to the extent that it was possible to award an equal number of channel reservations to each applicant.¹²⁹ This assignment scheme favored mergers over mutual exclusivity among DBS permittees by assigning fewer channels than were sought by each permittee for construction of an independent DBS system.

69. This method of accommodating all applicants appears to have created significant delay in making DBS orbital/channel assignments. Unlike fixed-satellite service operators, which receive construction authorizations and orbital location assignments at the same time, DBS permittees are assigned specific channels and orbital locations on a first come, first served basis only after demonstrating proper satellite construction contracting.¹³⁰ The due diligence analysis on which these assignments are based is time-consuming and exacting. While some permittees proceed apace as assignments are made, other permittees may seek to negotiate mergers or cooperative ventures, and put construction of a DBS system on hold while waiting for a clearer picture of ultimate orbital/channel assignments to emerge. Even sincere efforts to forge a cooperative DBS venture can involve delay as parties negotiate agreements and seek the necessary Commission approval of a merger or sale.¹³¹ Moreover, requests for extension of time, modification requests, and transfers or assignments all require independent review by the Commission, in addition to the analysis of each permittee's due diligence demonstration.

70. It appears that such delays would only be perpetuated by reassignment of ACC's channels under the policy announced in *Continental*. In that case, six permittees (other than ACC) received a total of 30 paired and 8 full-CONUS channels fewer than they had

¹²⁸ *Continental*, 4 FCC Rod at 6293.

¹²⁹ We reserved eight paired channels (the total number requested) for USSB and eleven paired channels each for ACC, *Continental*, EchoStar, Direcstar, DBSC, Tempo Satellite, and Hughes/DIRECTV. *Id.* at 6300-01 and 6304 n.42. These channel reservations were 5 paired channels fewer than had been requested by ACC, EchoStar, Direcstar, Tempo Satellite, DBSC, and DIRECTV, respectively, and 5 paired and 8 full-CONUS channels fewer than had been requested by *Continental*. *Id.* at 6295-97.

¹³⁰ See, e.g., *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 3 FCC Rod 6972 (1988); *American Satellite Co.*, 3 FCC Rod 6969 (1988); see also *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in 2310-2360 MHz Frequency Band*, FCC No. 95-229, June 15, 1995 (proposed rules provide for simultaneous grant of applications and assignment of orbital locations).

¹³¹ We reemphasize here that, while some delays may result during negotiations on mergers or cooperative arrangements, the negotiating parties must still comply with our due diligence requirements, and failure to make appropriate progress towards completion of an operational system is not excused by such negotiations.

requested.¹²⁷ Under Continental, each of those permittees would have the first right to a *pro rata* distribution of ACC's cancelled channels. As a result, six permittees would be assigned four paired channels each, further complicating the already fractured distribution of DBS channels.¹²⁸ Since four channels may not provide sufficient capacity to operate a viable system,¹²⁹ such piecemeal assignment of channels could render the potentially full-CONUS orbital location at 110° unusable by any single permittee. We could then anticipate further delays as the permittees negotiated to aggregate a sufficient number of channels (by merger or buyout) to justify the expense of launching a DBS service at that location. In the meantime, the public would suffer as these valuable DBS resources went unused.

71. In addition, we fear that assigning channels pursuant to Continental will indefinitely delay completion of the last DBS processing round. This is a real prospect because the requests for a total of 30 paired and 8 full-CONUS channels of the six permittees who received fewer channels than requested in Continental could not be satisfied by distributing ACC's 27 cancelled pairs of channels. Absent a change in policy, these requests could only be satisfied upon cancellation or surrender of another's permit. Thus, existing DBS processing procedures, in combination with the policy adopted in Continental, have not fostered the swift construction and operation of DBS systems.

72. It is our current opinion that opening a window for new applications for DBS permits to use reclaimed channels (and orbital positions), and then deciding among mutually exclusive applications by auction, will best serve the public interest. EchoStar argues that the Commission may not revisit the Continental decision without prior notice to the public and a complete record on the issue of channel/orbital assignments.¹³⁰ Our decision to initiate a rulemaking proceeding on these issues (see ¶ 66, *supra*) obviates these concerns. Moreover, our commitment to expedite that rulemaking will ensure that the cancelled channels are assigned, either by auction or some other method, in January 1996.

73. It does not appear that adoption of a new assignment method would present a significant barrier to successful implementation of DBS service by the parties affected. All of the permittees have received the orbital/channel assignments that we specifically reserved for them in Continental, and no permittee has received any additional assignments as a result of

cancelled or surrendered permits sufficiently flexible to incorporate, successfully operating the suggested in Continental that proved insufficient. Permittee joined with EchoStar and they and USSB currently provide existing permittees and license no additional channels assigned.

74. For the foregoing consider new rules for the DBS procedures and auction rules, also propose rule changes in CONUS DBS service. We are uncertain about its technical our assignment policy need to era of DBS service to the public utilized and the public reap the

C. EchoStar's Request

75. On May 30, 1995, Managing Director, notified that had occurred in this proceeding presentations by a CATA, assistants on May 2, 3, and of CATA, C-SPAN, and assistants on May 8, 1995. Association Convention, employees indicated that they and also stated their beliefs were parties to the underlying

¹²⁷ See footnote 129, *supra*.

¹²⁸ For example, Directstar has been assigned a single channel at 110°, and USSB has three channels at the same location. See footnotes 94 and 108, *supra*.

¹²⁹ Tempo Satellite has recently indicated that even the 11 channels it has at 119° "are not sufficient for a competitive system." See letter from Richard E. Wiley to Hon. Reed E. Hundt at 2 (dated August 15, 1995).

¹³⁰ See EchoStar Opp. at 32-33; Letter from EchoStar to William F. Caton, dated June 16, 1995.

¹³¹ Two permittees have it had not yet determined had not yet indicated Dominion Video Services

¹³² See Letter from William F. Caton to William F. Caton, dated June 16, 1995. This notification was Rules, 47 C.F.R. § 1.101

cancelled or surrendered permits.¹²⁶ Although existing permittees' DBS plans may be sufficiently flexible to incorporate additional channels, several are already, or very soon will be, successfully operating their DBS systems without the further assignments. Moreover, we suggested in *Continental* that permittees enter cooperative ventures if existing assignments proved insufficient. Permittees that have done so have met with success: Directsat has joined with EchoStar and they are scheduled to begin operations within months; DIRECTV and USSB currently provide independent services from a shared satellite. Thus, plans of existing permittees and licensees for DBS service will not be unduly disrupted if they receive no additional channels assignments.

74. For the foregoing reasons, we will initiate a rulemaking proceeding this month to consider new rules for the DBS service. This proceeding will consider new processing procedures and auction rules to assign any available DES orbital/channel resources. We may also propose rule changes in the wake of DIRECTV/USSB's successful deployment of full-CONUS DBS service. We approved such service only on a conditional basis in 1989 & to uncertainty about its technical feasibility. In light of its apparent success, certain aspects of our assignment policy need to be reconsidered. We intend to adopt rules to usher in a new era of DES service to the public, in which DBS orbital/channel assignments are swiftly utilized and the public reaps the full benefit of DBS spectrum resources.

C. EchoStar's Request as to *Prohibited Ex Parte Communications*

75. On May 30, 1995, the Commission's Acting Secretary, on behalf of the Managing Director, notified the parties of several prohibited *ex parte* communications that had occurred in this proceeding.¹²⁷ These communications were comprised of: (1) three oral presentations by a CATA representative made by telephone to two Commissioners' legal assistants on May 2, 3, and 4, 1995; and (2) three oral presentations made by representatives of CATA, C-SPAN, and Comcast, respectively, to two Commissioners and their legal assistants on May 8, 1995, while they were attending the National Cable Television Association Convention. In reporting these *ex parte* communications, the Commission employees indicated that they were unaware at the time that the proceedings were restricted and also stated their belief that none of the persons making the presentations (none of whom were parties to the underlying proceeding) were aware that the proceedings were restricted.

¹²⁶ Two permittees have not yet received assignments for their western orbital locations only, one because it had not yet demonstrated due diligence in contracting for its western satellite, and the other because it had not yet indicated which western orbital location it preferred. See EchoStar, 7 FCC Rod at 1771; Dominion Video Satellite, Inc., DA 95-1734 (August 4, 1995).

¹²⁷ See Letter from William F. Caron, Acting Secretary, to Robert W. Johnson et al., dated May 30, 1995. This notification was made pursuant to and in compliance with Section 1.1212(e) of the Commission's Rules, 47 C.F.R. § 1.1212(e).

76. Further, on May 15, 1995, the Chairman of General Instrument Corporation ("GIC"), which is also a non-party, made a written *ex parte* submission to all of the Commissioners. One week later, GIC notified the managing Director that, unaware of the proceeding's restricted status, it had made the impermissible written communication.¹³⁹ GIC then served copies of its submission on all parties.

77. EchoStar has requested an investigation to determine whether any additional *ex parte* communications occurred while the proceeding was still restricted and such communications were therefore prohibited under the Commission's rules.¹⁴⁰ Although on May 26, 1995, the Commission issued a public notice changing the status of this proceeding from restricted to non-restricted,¹⁴¹ and EchoStar subsequently used the opportunity afforded by this reclassification to hold discussions with Commission personnel, EchoStar contends that this "cannot cure the potential harm caused by prior prohibited efforts to influence the process."¹⁴² It therefore requests that the Commission issue an order to show cause why the Commission should not draw inferences adverse to the positions advocated in the *ex parte* communications, as a sanction for violation of the Commission's rules.

78. We see no reason to conduct an investigation into whether additional prohibited *ex parte* communications may have occurred. We note that as soon as Commission personnel learned that the proceeding in question was a restricted matter, appropriate disclosure of the oral contacts was made. We further note that as soon as GIC realized that its written presentation was not permissible under the Commission's *ex parte* rules, GIC itself promptly notified the Managing Director of the communications and served copies of the prohibited presentation upon the parties to the proceeding. In view of these circumstances, we have no reason to believe, and EchoStar has not offered evidence to suggest, that any additional presentations not permitted under the rules have occurred. We therefore deny EchoStar's request for an investigation.

79. We also deny EchoStar's request that we issue an order to show cause why the Commission should not draw inferences adverse to the positions taken in the improper *ex*

parte communications made in those present competition to DIRECT programming capabilities prohibited communications even though they have failed to satisfy it that any harmful prejudice substance of the prohibition similar arguments were full opportunity to respond submissions. We there

80. Accordingly:
Advanced Communication

81. IT IS ORDERED:
Partners, L.P., Cable TV
are DISMISSED for lack

82. IT IS ORDERED:
Tempo DBS, Inc. is DISMISSED

83. IT IS ORDERED:
for an investigation into
in this proceeding is DENIED

¹³⁹ See Letter from Ronald K. Machley to Andrew Fishel, Managing Director, dated May 22, 1995.

¹⁴⁰ See footnote 29, *supra*.

¹⁴¹ See Public Notice No. 54107 (Int'l Bur. May 26, 1995) ("Ex Parte Notice"). Our rules provide that "the Commission retains the discretion to issue public notices setting forth modified or more stringent *ex parte* procedures." 47 C.F.R. § 1.1200(a). In this instance, because the application proceedings raised "complex legal and policy issues" and concerned "rapid developments in the DBS service, the Bureau determined that modification of the *ex parte* rules would "assist the Commission in developing a more complete record on which a well-reasoned decision can be made." Ex Parte Notice at 1. Although EchoStar questions the wisdom of the Bureau's reclassification of this proceeding, we decline to undo the Bureau's reasonable exercise of its discretion.

¹⁴² Letter from Philip L. Malet to Andrew Fishel, Managing Director, dated June 13, 1995, at 3.

¹⁴³ See EchoStar Opp. at

¹⁴⁴ See ¶ 16, *supra*.

parte communications. EchoStar has identified two specific arguments that it asserts were made in ~~the~~ presentations: (1) that grant of ACC's applications is necessary to ensure competition to DIRECTV; and (2) ~~the~~ grant of ACC's applications will provide digital programming capability to rural cable systems.¹⁴¹ We note that the persons who made the prohibited communications were not parties at the time the presentations were made and that, even though they have subsequently attempted to become participants in this proceeding, they have failed to satisfy the requirements for party status.¹⁴² In any event, we are not persuaded that any harmful prejudice has occurred ~~that~~ would warrant the requested sanction. The substance of the prohibited presentations were fully disclosed soon after they were made, similar arguments were made on the record of the proceeding, and EchoStar has thus had a full opportunity to respond to the substance of these claims both orally and in written submissions. We therefore deny EchoStar's request for sanctions.

N. ORDERING CLAUSES

80. Accordingly, **IT IS ORDERED** that the Applications for Review filed by Advanced Communications Corporation and Tempo DBS, Inc. are **DENIED**.

81. **IT IS FURTHER ORDERED** that the Applications for Review filed by Primestar Partners, L.P., Cable Telecommunications Association, and General Instruments Corporation are **DISMISSED** for lack of standing.

82. **IT IS FURTHER ORDERED** that the Motion for Expedited Action filed by Tempo DBS, Inc. is **DISMISSED AS MOOT**.

83. **IT IS FURTHER ORDERED** that the Request by EchoStar Satellite Corporation for an investigation into and imposition of sanctions for prohibited *a parte* communications in this proceeding is **DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹⁴¹ See EchoStar Opp. at 42-43.

¹⁴² See ¶ 16, *supra*.

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Dissenting Statement of
Commissioner James H. Quello

In the Matter of Advanced Communications Corp.

In its decision today, the majority has changed the DBS due diligence rules in the middle of the game, unlawfully and unfairly disadvantaging an innocent participant. By a slim majority indicative of the difficult factual, legal and policy issues before us, the Commission has affirmed the International Bureau's finding that Advanced Communications Corp. failed to meet its due diligence obligation in the construction and launch of its DBS system. The result: Advanced's construction permit has been cancelled, its application to assign its DBS construction permit to Tempo has been dismissed as moot, and the channels and orbital locations previously assigned to ACC will likely be auctioned to the highest bidder. The practical public interest result of the majority decision: the future of a small cable operator "headend in the sky" has been jeopardized; the date for the arrival of first-ever DBS service to Alaska and Hawaii is unclear; and additional multichannel video programming competition from another DBS provider will be delayed.

Because this decision demonstrates a lack of understanding of the history of the DBS service, and because it fundamentally misapplies Commission precedent, I respectfully dissent.

The History of the DBS Service

I find it interesting that the two dissenters in this case are the two senior Commissioners at this Agency. In my view, this is no coincidence. My colleague and I have experienced firsthand the growing pains of a fifteen-year-old satellite service that many experts and pundits long ago wrote off as a technology that would never make it from the drawing board into the home. This skepticism was not without some foundation, given the substantial developments in DBS satellite technology, changes in Commission policy, regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures of the late 1980's, all of which necessitated changes in business plans, expenditure of additional funds, and delay. Moreover, my colleague and I have served on this Commission when it bravely refused, despite the dire predictions of these "experts," to abandon an industry that promised to offer subscribers an alternative to cable service.

It is this firsthand experience, together with the fact that the DBS industry is only beginning to become a viable and competitive service, that highlights to me the absurdity of the majority's decision to execute one of the survivors of this brush with marketplace death. As a veteran, this strikes me as somewhat akin to rewarding a survivor of the Charge of the Light Brigade by putting him in front of a firing squad.

Let us inhibit the viability of a service that still needs relief from undue regulatory constraints that could inhibit its growth — and by growth I mean the growth of a service that

includes numerous DBS providers that can compete with each other as well as with other multichannel video programming providers — this Commission should have continued to apply its due diligence requirements in an even-handed and forward-thinking manner. Sadly, this goal will not be achieved. The decision by the majority in this case assumes that, because two DBS providers (including one owned by the largest corporation in America in 1994) launched service from a shared satellite in October of 1994, this service has "arrived." This rationale leads the majority to conclude that extensions of time can be denied, willy nilly, and that recovered spectrum should be auctioned off to anyone with a pocket deep enough to jump onto the DBS bandwagon late in the parade. This result is patently unfair to Advanced and the other DBS licensees and permittees who invested time and money 15 years ago when the possibilities that this service would become viable were minimal, at best. Moreover, this result, despite the ambitious timetable set by the majority, will result in further delays in the initiation of service by new DBS providers.

The Commission's Due Diligence Requirement

In ruling on a request for extension of a DBS construction permit, the Commission considers "[t]he totality of the circumstances — those efforts made and those not made, the difficulties encountered and those overcome, the rights of all parties, and the ultimate goal of service to the public." USSB I, 3 FCC Rod 6858, 6859 (1988). In short, the Commission must weigh the delay in scheduled implementation of service against the claimed public interest benefits. USSB II, 7 FCC Rod 7247, 7249 (Vid. Svc. Div. 1992).

The majority in this case finds that Advanced does not merit an extension because it made little progress toward construction, launch, and initiation of a DBS system, despite passage of "more than a decade, including one four-year extension of time." Majority Op. at para. 2. However, I believe that the efforts of Advanced were fully consistent with Commission precedent, and that the delay in service that will inevitably result from denial of Advanced's extension request will far exceed the minimal delay that would have resulted had Advanced's extension request and application for assignment of its construction permit to Tempo been granted. Had the Advanced/Tempo deal been allowed to proceed, a DBS satellite would likely have been launched in April 1996. One has only to look at the history of decisionmaking at this Agency to realize that it will only be through extreme luck bordering on divine intervention that the unrealistic timetable set forth in the majority decision is likely to be achieved. That decision anticipates that a major change in the policy for the reassignment of recovered channels, adoption of auction rules, and the completion of an auction, can all be finalized within the next three months.

Turning to the due diligence showing of Advanced, it is important to note that the only period relevant to the Commission's decision in this case is the four-year period following the grant of Advanced's first extension request, not the entire ten-year period since Advanced was granted a construction permit. The Commission previously ruled on

DBS providers, failed to commence operation of its system because the Commission's initial six-year construction milestone proved to be unrealistic. As the majority opinion recognizes, provision of DBS service was not feasible for the first six years that Advanced held its permit for the reasons I delineated above: substantial developments in DBS satellite technology, changes in Commission policy regarding channel and orbital assignments, and the Challenger and Ariane launch vehicle failures.

As to Advanced's efforts during the four years since its first extension was granted, it is relevant to note that Advanced did not receive its full complement of frequencies and orbital positions until April of 1991, in a decision that did not become final until November of 1991. The Commission has stated in two recent decisions that it is unrealistic to expect permittees to begin construction until the Commission has awarded them specific orbital slots and channels. See Continental Satellite Corp., 4 FCC Rcd 6292 (1989), partial recon. denied, 5 FCC Rcd 7421 (1990); Dominion Video Satellite, Inc., 8 FCC Rcd 6680 (1993), recon. denied, FCC No. 95-421 (Oct. 5, 1995). Therefore, for the first year of its four-year extension period, Advanced cannot have been expected to have demonstrated progress toward construction.

So we come down to the issue of what Advanced did, or did not do, between 1992 and 1995. In examining Advanced's efforts during this period, one must look to Commission precedent in which other DBS permittees have been granted extensions with showings similar to Advanced's. None of these extension requests were denied. While it cannot be argued that there are no distinctions between the due diligence showings of Advanced and the DBS applicants whose extension requests were granted, painted on a precedential backdrop in which the Commission stated that its regulatory priority was fostering the development of a fledgling service, they constitute distinctions without a difference.

In a decision adopted in January of this year, the Commission approved Directsat's for-profit sale of its construction permit for an unbuilt DBS system to EchoStar. Directsat Corp., 10 FCC Rcd 88 (1995). The Commission reasoned that for-profit sales of permits can be allowed in the DBS service because of the presence of our due diligence rules, which suffice to prevent warehousing of spectrum. *Id.* at 89. The Commission thus noted in Directsat Corp. that a significant amount of money had been invested in satellite construction and that construction milestones had been met. At the time the Commission approved the transfer, however, Directsat had expended 0.13% of the contract price for the construction of satellites and the construction phase of its satellites had not even begun. See Directsat Semi-Annual Progress Report, Exhibit E to Contract Modification No. 7, filed August 16, 1994.

Unfortunately, the majority in this case refused to attribute Tempo's investment and construction progress to Advanced, even though the Commission earlier this year had attributed EchoStar's investment and construction progress to Directsat. Moreover, despite waxing eloquent for several pages, the majority fails to adequately explain why Advanced's showing is decisionally less significant than Directsat's in light of Directsat's August 1994

Progress Report. Specifically, the majority fails to note that, at the time their assignment applications were filed, Directsat had expended a mere 0.13% of the contract price and that this constituted due diligence; whereas Advanced's payments on its satellite contract were deficient because they amounted to less than one percent of the contract price. The majority also fails to note that the actual dollar amount expended by Advanced was later specified in a letter filed in the record dated September 19, 1995, as \$7-8 million. The actual dollar amount expended by Directsat prior to its merger with EchoStar, while not set forth in the majority opinion or in Directsat's 1994 Progress Report, is likely significantly less than the amount expended by Advanced.¹

The majority attempts instead to distinguish the Advanced case from Directsat Corp. by claiming that Directsat requested only a transfer of its construction permit, not an extension of time to construct. Directsat's DBS authorization, however, expired on August 15, 1995, and EchoStar has applied for an extension. That EchoStar would require an extension was apparent at the time Directsat filed its transfer application. Moreover, the Commission in Directsat Corp. felt compelled to comment on Directsat's progress toward construction of its DBS system, a comment that presumably would have been unnecessary had the Commission felt that Directsat's due diligence was irrelevant. The key difference, then, between Directsat and Advanced appears to be the order in which the extension and transfer applications were submitted. This distinction without a difference should not be the key factor in determining the fate of a DBS permittee, and the majority offers no reason why it should be of decisional significance.

In 1991, the Commission granted a second extension of a permittee's construction permit in light of its contract to use satellites provided by a competitor. USSB II, 7 FCC Red at 7251. The Commission based its extension on the fact that the permittee, USSB, had complied with due diligence requirements by contracting to use transponders on a satellite designed, built and launched by DIRECTV. In fact, this Commission has maintained that DBS service will be expedited if DBS permittees "are free to seek Commission approval to combine assignments and resources through merger or buyout." Continental Satellite Corp., 4 FCC Red. at 6299 (1989). Like USSB and Directsat, Advanced heeded the Commission's admonition to proceed diligently by entering into a binding, non-contingent contract with Tempo DBS for delivery of satellites, but the Commission refused to credit Advanced with

¹The majority makes much of Advanced's "fail[ure] to specify how much money it actually invested in the construction of its satellites." Majority Op. at para 50. Apparently, the majority is unaware of the September 19, 1995, letter filed by Advanced as part of the record in this proceeding in which it revealed that \$7-8 million was paid toward construction of its satellites. Moreover, it is interesting to note that Commission rules do not require a permittee to reveal the actual amount it has invested in its satellite system; rather the rules require that the permittee reveal what percentage of the satellite cost it has invested. Advanced, like Directsat, fully complied with this requirement in filing its progress report with the Commission.

the construction progress made on the Tempo satellites. Significantly, Tempo DBS's contract to finance Advanced's satellite launch was not contingent on the transfer of channels.

The majority, in distinguishing USSB II and the case involving Advanced, points out that it considers "the lack of ongoing involvement a key distinction between these two cases." Majority Op. at para. 53. While in USSB II the ongoing involvement of USSB is clear, such "ongoing involvement" is less clear in Directsat Corp., where Directsat transferred control of its DBS authorization to the parent company of EchoStar. Is "Directsat" still involved in the DBS business, or is it involved in name only? In my experience, when one company is bought out by another company, the company purchased is either eliminated entirely, or continues in name only under the complete control of the buyer. Again, the majority is, in my view, relying on a distinction without a difference in deciding to deny Advanced's extension request for this reason.

In conclusion, the majority has decided this case without taking full account of the history of this fledgling satellite service. Moreover, the majority has set up a series of tenuous and tortured distinctions without any difference in claiming that Advanced's situation is markedly different from that of other permittees in cases with remarkably similar facts. As a result, the majority gives companies that chose to sit out the hard developmental days of DBS a windfall chance to participate in a gold rush, and leaves one of the pioneers of the DBS service with only a painful of mica. This result squares with neither the law nor with equity, and therefore I dissent.

DISSENTING STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

In Re: Advanced Communications Corporation Application for Extension of Time To Construct, Launch, and Operate a Direct Broadcast Satellite System; Application for Consent To Assign Direct Broadcast Satellite Construction Permit from Advanced Communications Corporation to Tampe DBS, Inc.; Application for Modification of Direct Broadcast Satellite Service Construction Permit (File Nos. DBS-94-11KIT, DBS-94-15ACP, DBS-94-16MP).

Pursuant to today's action, the Commission affirms the International Bureau's ("Bureau") determination that Advanced Communications Corporation ("ACC") failed to meet its due diligence obligation of proceeding expeditiously with the construction and launch of its direct broadcast satellite ("DBS") system.¹ As a result, the channels and orbital locations previously assigned to ACC will revert to the public for reassignment. Further, the Commission has chosen to initiate a rule making to establish a new methodology by deciding upon mutually exclusive applications for the reassignment of DBS channels and orbital positions. As a result of my disagreement with the Commission's due diligence finding, in this case, I feel compelled to dissent from today's decision.

In the past when reviewing due diligence efforts by DBS permittees, the Commission has heretofore granted extensions to several permittees in an effort to encourage the delivery of DBS service to the public. To that end, over the years, the Commission has exercised greater flexibility when reviewing the due diligence criteria for various DBS permittees, even though these somewhat relaxed expectations may have proven unacceptable for other video programming providers in the marketplace. It would therefore, in my opinion, seem entirely unreasonable, and indeed, irresponsible, for the Commission to disregard its primary objective--to encourage competition amongst DBS providers in order to enhance consumer choice--by forestalling yet another viable and prepared DBS competitor from entering the marketplace in the immediate future.

The Commission's due diligence requirements have two components. First, the Commission requires that a DBS permittee

¹ Advanced Communications Corp., 77 Rad. Reg. 2d (P&F) 1160 (DA 95-944, April 27, 1995).

begin construction or complete contracting for construction the satellite station within one year of the grant of its construction permit. Secondly, the permittee must begin operation of the satellite station within six (6) years of the grant of its permit, unless otherwise determined by the commission.

In denying ACC's request for an extension, the Bureau concluded that, from its assessment of the totality of the circumstances, ACC had made little progress in the construction, launch and initiation of a DBS system in the past decade. The record indicates that in 1984, the Commission granted ACC's application for authority to construct and launch a DBS system, subject to its fulfillment of the Commission's due diligence requirements. In October 1986, the Commission found that ACC had complied with the first due diligence component by contracting for the construction of its first two DBS satellites. As a result, the Commission granted ACC's request for sixteen (16) channels at each of two orbital locations. In addition, ACC requested additional channels at these locations as part of its modification application. The Commission reserved, but did not assign, eleven (11) additional pairs of channels for ACC conditioned upon ACC's satisfaction of the first prong of its due diligence. In February 1990, Advanced applied for a four year extension of time to construct and operate its DBS system. The Commission granted this request in April 1991 (extending the deadline to December 7, 1994), and assigned ACC nineteen (19) additional channels. Importantly, as the record indicates, ACC did not receive its final channel assignments until April 1991. Therefore, I believe it is imperative that we focus our review on ACC's actions subsequent to that date.

Despite ACC's efforts in developing its DBS system, to wit: ACC's failed negotiations for a joint venture with another DBS permittee, EchoStar Satellite Corporation ('EchoStar') as well as its contractual agreement with Tempo DBS, Inc. ('Tempo') for the construction and launch of a satellite, the Bureau concluded that these actions did not amount to the actual construction of a DBS satellite or arrangement for the launch and operation of DBS service. I am puzzled as to why the Bureau determined to apply different set of criteria for ascertaining due diligence than were used for other permittees with respect to the launch of service in reaching its finding that ACC had not met the due diligence requirements.

I do not believe that ACC's efforts are patently

² See 47 C.F.R. § 100.19(b).

³ Tempo DBS is an affiliate of Tele-Communications, Inc. ('TCI').

distinguishable from the efforts made by those permittees in cases in which the Commission either granted an extension request or a transfer of control application. For example, in July 1991, United States Satellite Broadcasting, Inc. ('USSB') filed an extension request and a minor modification of its construction permit concerning its authorization to operate a DBS satellite on five (5) channels at a specific orbital location. In its minor modification application, USSB stated that it had entered into an agreement with another entity, Hughes Communications Galaxy, Inc., ('Hughes'), to purchase a payload of five (5) transponders. Significantly, these transponders were not on one of USSB's constructed and launched satellites, but on one of Hughes' satellites, to be located at the same orbital location as USSB's channels. As a result, USSB sought authority to implement its five (5) channel service by utilizing five (5) transponders on one of Hughes' satellites rather than constructing and launching a separate five-channel GE Astro-Space satellite as previously proposed and approved.⁴ In addition, USSB sought to modify the technical specifications of its authorization to conform to the specifications of the Hughes satellite. It should be noted that USSB's DBS system was required to be in operation by December 1992, while Hughes' system was not required to be in operation until December 1994.. As a result, USSB requested that its completion date be reconciled with that of Hughes. In that case, the Commission applied an analysis that led to the conclusion that the ultimate goal of service to the public would be advanced by a grant of USSB's request for extension of time.⁵

In this Order, the Commission also concludes that ACC's due diligence efforts were different from those of Directsat Corporation ('Directsat').⁶ I am not persuaded by the Commission's findings. Directsat received its DBS construction permit in August 1989. The Commission determined that Directsat had satisfied the first due diligence requirement in November 1993 and accordingly assigned it ten (10) channels. Only five months later, Directsat sought approval for transfer of control of its permit to EchoStar's parent company. Interestingly, EchoStar held eleven (11) channels at the same location as those held by Directsat. The Commission granted that authorization in

⁴ See In re Applications of United States Broadcasting Company, Inc., 7 FCC Rcd 7247, 7249 (1992).

⁵ Id. at 7250.

⁶ See In re Application of Directsat Corporation and EchoStar Communications Corporation, 10 FCC Rcd 88 (1994).

November 1994.'

It appears that the Commission credits Directsat for negotiating and consummating a transaction with Echostar in a more expeditious fashion than ACC. While I acknowledge that an uncertain business situation, or an unfavorable business climate in general have not been adequate explanations for failure to meet a construction timetable, I do believe that, under these circumstances, the Commission must remain cognizant about the practicalities of the marketplace. A period of lengthy negotiations does not necessarily denote a clear intention to delay. Indeed, negotiations between Echostar and ACC failed within one (1) year of the grant of ACC's April 1991 extension. Clearly, the negotiations between ACC and Echostar involved a substantial transaction that finally resulted in protracted litigation. As evidenced by the record, both parties proceeded to conduct negotiations with other parties. Unfortunately for ACC, such events transpired near the expiration of its construction permit. On the other hand, we note that Directsat immediately consummated a deal with Echostar. What the Commission fails to acknowledge is that Directsat and Echostar had the same orbital location and thus derived the benefit of economic efficiencies. On the other hand, the Commission also fails to note that negotiations between Tempo and ACC advanced to the point where Tempo began to commence construction of its satellites to accommodate the 110° orbital location.'

Although the Commission in the instant Order seeks to elaborate on various differences between ACC's and USSB's and Directsat's actions, I am not wholly persuaded that the distinctions are as obvious as espoused. In my view, a review and analysis of the Gordian knot of issues in this case will reveal certain distinctions. For instance, one may argue that the public would have also benefited from the sale of ACC's permit to Tempo by increasing the choice of DBS providers. Therefore, I do not believe that ACC's efforts are substantially incongruent with those of USSB and Directsat so as to warrant a finding of no due diligence and the revocation of ACC's permit.

It should also be noted that Directsat was permitted to profit from its sale of the permit. Because of my unwillingness to support our finding of no due diligence here, I am persuaded that ACC should have been afforded the same opportunity.

' See In re Applications of United States Broadcasting, 3 FCC Rcd 6858, 6859 (1988).

' I make this observation only for purposes of demonstrating an intention by the parties to proceed with a DBS system without undue delay.

By comparison with the other pertinent instances, I am not convinced that ACC did not satisfy the due diligence requirements. Unfortunately, I believe that Commission precedent in this area is murky enough so as to elicit persuasive arguments in this case for both sides. Based on the public policy concerns, however, it is clear that the Commission, in the past, gave DBS permittees greater flexibility. Based on the fact that DBS service was a relatively fledgling industry in which there were very few players and in the interest of nuking DBS service available to the public. As a result, until such time as the Commission had established and clearly stated a definitive and inflexible approach to the due diligence standard, I believe the Commission should have used a similar basis for determining ACC's due diligence compliance. As a consequence, I would have approved an assignment of ACC's permit to Tempo.

REASSIGNMENT OF CHANNELS

The Commission has announced that it intends to initiate an expedited rulemaking proceeding to establish a new methodology for reassigning DBS channels and orbit 81 positions. Based on the assumption that auctions will be used to reassign the reverted channels, the Commission has proposed to hold the DBS auction within the next three (3) months. Based on the Commission's past experience with auctions and the complexities involved in developing acceptable service and auction rules, I firmly believe that such a timetable is wholly unrealistic. Moreover, I am convinced that today's decision as well as any rules promulgated for auction in this service will be subject to judicial challenge that will considerably delay additional DBS service to the public.

The Commission has, on prior occasions, indicated that one of its primary goals in the DBS area is to promote the prompt initiation of DBS service. Although I am loathe to prejudge a rulemaking for reassignment of the reverted channels, I am skeptical about the Commission's timetable for establishing a new methodology for the reassignment of DBS channels that will not further delay service to the public. Therefore, I will review the comments for the rulemaking which will be initiated in the immediate term with great interest.

AFFIDAVIT OF JAMES H. QUELLO

I, James H. Quello, having personal knowledge of the statements made herein, do state under oath the following:

1. During 1995, I was one of five Commissioners of the Federal Communications Commission ("FCC").

2. On October 16, 1995, in a 3-2 decision, the Commissioners denied the petition of Advanced Communications Corporation ("ACC") for an extension of time in which to construct, launch, and operate its Direct Broadcast Satellite ("DBS") system, in the case *In re Advanced Communications Corp.*, Federal Communications Commission, Nos. DBS-94-11EXT, DBS-94-15ACP, DBS-94-16MP, Memorandum Opinion and Order (October 16, 1995) (the 'Advanced Order').

3. As a result of the Advanced Order, the channels and orbital locations previously assigned to ACC were reverted to the public for reassignment by auction.

4. I dissented from the decision in the Advanced Order, and a copy of my dissenting opinion is attached hereto. In addition, based on my deliberations with the other Commissioners, at least one of the Commissioners in the majority based his or her decision in the Advanced Order on the expectation of Federal revenues that would result from the reassignment by auction of the channels and orbital locations previously assigned to ACC, which I believe violates 47 U.S.C. § 309(j)(7)(A).

FURTHER THE AFFIANT SAYETH NAUGHT.

James H. Quello
James. H. Quello

District of)
Columbia)SS.
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SWORN TO AND SUBSCRIBED before me, a Notary Public, this the 11th day of
October, 2001.

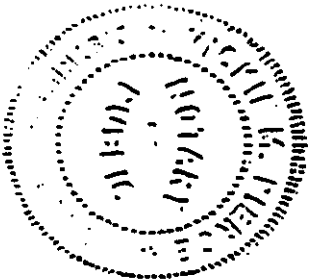
Vickie M. Pierce
Notary Public

My Commission Expires:

Notary Public District of Columbia
~~My Commission Expires 07/14/2004~~

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VICKIE M. PIERCE
Notary Public District of Columbia
My Commission Expires 07/14/2004



Dissenting Statement of
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